

<p>BOARD OF ASSESSMENT APPEALS, STATE OF COLORADO 1313 Sherman Street, Room 315 Denver, Colorado 80203</p> <hr/> <p>Petitioner:</p> <p>JEREMY FEIN, INC.,</p> <p>v.</p> <p>Respondent:</p> <p>DENVER COUNTY BOARD OF EQUALIZATION.</p>	<p>Docket No.: 68080</p>
<p>ORDER</p>	

THIS MATTER was heard by the Board of Assessment Appeals on October 25, 2016, Diane M. DeVries and Amy J. Williams presiding. Petitioner was represented by Richard G. Olona, Esq. Respondent was represented by Noah Cecil, Esq.

On November 10, 2016, the Board issued an Order in this matter. Respondent filed a motion to reconsider the Board’s Order on November 18, 2016, and Petitioner filed a response to Respondent’s motion on December 1, 2016. The Board issued an order on December 2, 2016 indicating that it would issue a final agency order for this appeal following its review of Respondent’s motion and Petitioner’s response. This Order reflects the Board’s final agency order for this appeal.

Petitioner is protesting the 2015 actual value of the subject property.

The parties stipulated to the admission of Petitioner’s Exhibits 1 and 2 and Respondent’s Exhibit A.

The subject property is described as follows:

**3500 Blake Street
Denver, Colorado 80205
Denver County Schedule No. 02271-16-022-000**

The subject property is a 15,520-square foot warehouse building located on a 1.15-acre site. The subject warehouse building was constructed in 1969 of steel frame with pre-cast concrete panel walls and is of average quality and in average to fair condition.

Petitioner is requesting an actual value of \$750,000 for the subject property for tax year 2015. Respondent assigned a value of \$1,751,000 for the subject property for tax year 2015.

Petitioner called Mr. Todd Stevens, President, Stevens & Associates Cost Reduction Specialists, Inc., as a witness. Mr. Stevens, referencing Exhibit 1, a consulting report he prepared, testified that the subject was built in 1969 and had no significant upgrades since its construction. He then reviewed the sales used within the Sales Comparison Approach. Five sales were utilized, ranging in sale price from \$765,000 to \$1,675,000, or \$45.43 to \$65.52 per square foot. After adjustment, the sales supported a value for the subject within a range between \$47.70 and \$72.08 per square foot and a value of \$55.00 per square foot was selected, resulting in an indication of value via the Sales Comparison Approach of \$853,600, rounded.

Mr. Stevens went on to review the Income Approach. Within the Income Approach a triple net lease rate of \$4.50 per square foot was selected, from which a 5 percent vacancy and collection loss and 10 percent operating, maintenance and reserve expense was deducted, producing a net operating income of \$59,713. An 8 percent capitalization rate was applied resulting in an indicated value via the Income Approach of \$746,415.

After considering the approaches to value within the consulting report, Mr. Stevens concluded to a final value for the subject property of \$750,000.

During cross examination, Mr. Stevens affirmed that he was not a licensed appraiser. He also testified that a Cost Approach was not prepared because he could not find any land comparables. He indicated that the subject was zoned CMX – Urban Center Mixed Use, but, on re-direct questioning, stated he did not think zoning was a characteristic of importance when valuing property for tax purposes.

Respondent called Ms. Kimberly Lust, Appraiser, Denver County Assessor's Office, as a witness. Ms. Lust described the subject location as an area undergoing significant change, with many redevelopment efforts underway. She testified that during the statutory appraisal time period the 38th and Blake Street light rail project was beginning to be constructed. Considering the neighborhood trends and characteristics of the subject, Ms. Lust concluded that the highest and best use of the property was for redevelopment and, therefore, the subject was being valued as vacant land.

Ms. Lust went on to review the sales utilized within her Sales Comparison Approach. Three sales were utilized, ranging in sale price from \$710,000 to \$2,300,000, or \$60.05 to \$62.45 per square foot. After adjustment, the indicated value range changed to \$731,300 to \$2,323,000, or \$61.85 to \$63.08 per square foot. Based upon the sales and analysis presented, Ms. Lust concluded to a value for the subject of \$63.00 per square foot, or \$3,150,000 via the Sales Comparison Approach.

Ms. Lust testified that property classification for assessment purposes is based upon current use. However, property is to be valued according to its highest and best use, which inherently considers reasonable future use. Ms. Lust also stated that sales of improved property wherein the improvement is demolished are considered vacant land sales. Therefore, sales of property which

apply for a demolition permit, or actually demolish the structure, are used as comparables for vacant land valuation. Ms. Lust indicated that Petitioner's sales were in less dense zoning districts than the subject. Finally, Ms. Lust stated that as the subject is considered vacant land, she did not include a Cost Approach or Income Approach.

After considering the approaches to value, Ms. Lust concluded to a final value for the subject property of \$3,150,000, or \$63.00 per square foot of site area.

During cross examination, Ms. Lust agreed that Petitioner's sales were arms-length sales which took place in the appropriate statutory base period. Similarly, she agreed that the lease comparables utilized by Petitioner were base period leases. Ms. Lust testified that the commercial division within the Denver County Assessor's Office had prepared an Income Approach valuation analysis of the subject. However, the concluded land value for the subject exceeded the valuation via the Income Approach and, therefore, the Income Approach was determined to be inapplicable. Ms. Lust further testified that she did not personally confirm the three comparable sales used in her Sales Comparison Approach, but she spoke to the appraiser within the Denver County Assessor's Office that did confirm each sale. Also, as she did not have data to support adjustments to her land sales she applied only nominal adjustments of one to two percent. Finally, Ms. Lust testified that the comparable land sales selected were the closest in proximity to the subject and with the most similar zoning.

During re-direct, the Board asked what improvements were located on Respondent's comparable sales. Ms. Lust stated that Sale No. 1 did not include any structures, she was uncertain if there were structures located on Sale No. 2, and Sale No. 3 included a 2,376-square foot warehouse.

During rebuttal testimony, Mr. Stevens testified that Respondent's Sale Nos. 1 and 2 were both vacant and were zoned I-1 and RMU-30, respectively. He stated Respondent's Sale No. 3 was improved with a small building and zoned IMX-3. However, when recalled as a witness, Ms. Lust testified that zoning for Respondent's sales, per the City and County of Denver records, was CMX-5 for Sale Nos. 1 and 2 and IMX-3 for Sale No. 3.

Respondent assigned an actual value of \$1,751,000 to the subject property for tax year 2015.

Sufficient probative evidence and testimony was presented to prove that the tax year 2015 valuation of the subject property was incorrect.

A taxpayer's burden of proof in a BAA proceeding is well-established: a protesting taxpayer must prove that the assessor's valuation is incorrect by a preponderance of the evidence in a de novo BAA proceeding. See *Bd. of Assess. Appeals v. Sampson*, 105 P.3d 198, 202, 208 (Colo. 2005).

After consideration of all three approaches to value, Petitioner provided a market and income approach to value the subject property. Petitioner's market approach included evidence of five comparable arms-length, base-period sales of similar properties, which were adjusted to conclude to a value indicated by the market approach of \$853,600. Petitioner's income approach included evidence

of several comparable base-period leases of similar properties. These leases were adjusted and a capitalization rate was applied to result in a value indicated by the income approach of \$746,415.

The Board notes that Respondent's expert witness acknowledged that she didn't have any evidence that the sales used in Petitioner's market approach were not arms-length or that they did not transact. She also acknowledged that the sales used in Petitioner's market approach were all base period sales of similar-sized properties of similar age located relatively close to the subject property. In her testimony, she did not express concerns with the adjustments made to the sales used in Petitioner's market approach. In addition, she acknowledged that she did not have any evidence that the leases used in Petitioner's income approach didn't occur, and she agreed that the leases were all from the base-period relating to similar aged buildings in a fairly proximate location of the subject property. Finally, she acknowledged that she didn't have any concerns with the vacancy allowance, the operating and maintenance reserve or the capitalization rate used in Petitioner's income approach. In short, Respondent's concern with the appraisal report prepared by Petitioner's expert witness was limited to whether he valued the subject property based on its highest and best use.

Unless otherwise directed by law, valuation for ad valorem property taxation should be based on a property's highest and best use, which is the use found to be physically possible, legally permissible, financially feasible and maximally productive. See ARL Vol 3, p. 1.7. Reasonable future use is relevant to a property's current market value for tax assessment purposes. *Bd. of Assess. Appeals v. Arlberg Club*, 762 P.2d 146 (Colo. 1988). Highest and best future use of land in its condition at the time of valuation may be considered in determining fair market value while speculative future uses may not be taken into consideration. See *Arlberg Club*, 762 P.2d at 154.

Petitioner argues that the current industrial use of the subject property is physically possible, legally permissible, financially feasible and maximally productive and is therefore the highest and best use for the subject property. See page 1-19 of Petitioner's Exhibit 1. Respondent argues that the value of the subject property's land significantly exceeds the value of the current improvement located on the land and that the current improvement contributes no value to the subject property. As a result, Respondent believes that any buyer of the subject property would tear down the improvement and that the subject property should be valued as if it were vacant land.

Neither Petitioner nor Respondent included a detailed highest and best use analysis in their appraisal reports with even minimal supporting data. Instead, both parties relied on sales of other properties to support their positions concerning the highest and best use for the subject property. Petitioner presented five comparable sales of industrial buildings located within about a mile of the subject property to demonstrate that other properties within the immediate area have sold and there is still a demand for industrial buildings in the area of the subject property. Respondent presented three property sales located within blocks of the subject property. Two of these properties were subsequently redeveloped, and the third property has approved plans and permits to be developed.

Based upon the evidence and testimony presented, the Board finds that the highest and best use of the subject property for tax year 2015 was its current use on the appraisal effective date. The Board was not convinced that the improvement located on the property did not contribute to the value of the land. The Board was also not convinced the highest and best use of the subject property

was as a redevelopment property or that the subject property should be valued as if it were vacant land.

The Board finds Petitioner's Sale No. 3 compelling. Like the subject property, Sale No. 3 property is improved with an industrial building. Sale No. 3 property and the subject property also have similar land areas. Both properties are located near or in the northeastern quadrant of the River North Neighborhood. Sale No. 3 property is located six blocks away from the subject property and within blocks of the 38th and Blake Street RTD rail station. Both properties also have mixed use zoning. The improvement on the Sale No. 3 property was not demolished after the sale, indicating that it contributed to the value of the property.

The other comparable sales and leases presented by Petitioner (located within about a mile of the subject property) also support a conclusion that the highest and best use of the subject property for tax year 2015 was its current use on the appraisal effective date. There were clearly other older industrial properties that were purchased in the general area of the subject property that were not demolished and re-developed. If the market for vacant land in this area as of the appraisal effective date was as great as Respondent suggests, there would likely be evidence of the demolition of industrial buildings with the general characteristics of the subject property (in terms of size, age and condition) and the redevelopment of these properties. This type of detailed evidence was not presented.

The Board was not convinced by Respondent's witness that the subject property should be valued as if it were vacant land. Respondent's witness presented inadequate data and analysis to convince the Board of a highest and best use that differs from the current use. The witness provided inconsistent testimony and did not fully analyze the three comparable properties she used in her report. She originally testified that these properties were not raw land sales but were all sales that were torn down and redeveloped into something else. She also testified that each of the properties sold with an improvement on them at the time of sale. However, when questioned about the specific structure that was previously on the Sale No. 1 property (such as the size and age of the structure), she was unable to provide this information and she changed her testimony to state that at the time of sale, the Sale No. 1 property was vacant land. Similarly, with respect to Sale No. 2 property, she was unable to provide information about the structure that was existing at the time of the sale. This information would be relevant for a complete highest and best use analysis of the subject property as vacant land using these comparable sales.

Respondent's expert witness also failed to appropriately adjust the comparable sales she selected. Particularly troubling was the failure to appropriately adjust the comparable sales in relation to the subject for site size or the presence of improvements.

The credibility of Respondent's witness and her report were impacted by a poor knowledge of the three properties she used as comparable sales, the failure to appropriately adjust the three comparable sales and the presentation of only meager documentation and analysis in support of her highest and best use argument.

Based on the evidence presented, the Board believes it would be inappropriate and speculative to consider a use of the subject property as of the appraisal effective date that differs from its current use.

The Board finds Petitioner's highest and best use more credible. The Board also finds Petitioner's market approach (which was generally not challenged by Respondent, except with respect to highest and best use) to be the most credible evidence presented. Therefore, a value of \$853,600 is concluded for the subject property.

ORDER:

The petition is granted. The Denver County Assessor is directed to change the assessment records of the subject property to reflect a value of \$853,600 for tax year 2015.

APPEAL:

If the decision of the Board is against Petitioner, Petitioner may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

If the decision of the Board is against Respondent, Respondent, upon the recommendation of the Board that it either is a matter of statewide concern or has resulted in a significant decrease in the total valuation of the respondent county, may petition the Court of Appeals for judicial review according to the Colorado appellate rules and the provisions of Section 24-4-106(11), C.R.S. (commenced by the filing of a notice of appeal with the Court of Appeals within forty-nine days after the date of the service of the final order entered).

In addition, if the decision of the Board is against Respondent, Respondent may petition the Court of Appeals for judicial review of alleged procedural errors or errors of law within thirty days of such decision when Respondent alleges procedural errors or errors of law by the Board.

If the Board does not recommend its decision to be a matter of statewide concern or to have resulted in a significant decrease in the total valuation of the respondent county, Respondent may petition the Court of Appeals for judicial review of such questions within thirty days of such decision.

Section 39-8-108(2), C.R.S.

DATED and MAILED this 5th day of January, 2017.

BOARD OF ASSESSMENT APPEALS

Diane M DeVries

Diane M. DeVries

Amy J Williams

Amy J. Williams

I hereby certify that this is a true
and correct copy of the decision of
the Board of Assessment Appeals.

Milla Lishchuk

Milla Lishchuk

